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15 IN THE UNITED STATES DISTRICT COURT
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17 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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DWIGHT R. CULTON, v. ERIC ARNOLD, Warden,	Petitioner, Respondent.
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C 14-05099 HRL (PR)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
ANSWER TO PETITION FOR HABEAS
CORPUS**

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STATEMENT OF THE CASE

2 Petitioner was sentenced to serve 25 years to life in state prison after a jury found him
 3 guilty of first degree murder. Exh. 1 at 117, 1485, 1602.

4 Petitioner appealed to the California Court of Appeal. On June 27, 2013, the Court of
 5 Appeal affirmed the judgment. Exh. 3. Petitioner's Petition for Review was denied on October
 6 2, 2013. Petitioner filed the instant Petition for Writ of Habeas Corpus on November 19, 2014.

7

STATEMENT OF FACTS

8 The facts of the case were summarized by the California Court of Appeal as follows:

9 In 1984, [Joan] Baldwin worked at an Earl Scheib auto painting shop on Bryant Street
 10 in San Francisco. The manager, Ara Derboghossian, allowed her to stay overnight in
 11 the shop in an upstairs room when she was having problems at home, but he did not
 12 give her the keys because to do so would put his job at risk. When the doors to the
 13 shop were locked at night, there was no way for Baldwin to get out of the building.

14 On the evening of April 5, 1984, Baldwin returned to the shop from happy hour at
 15 about 6:00 p.m. She followed Derboghossian as he locked the front and back sliding
 16 doors to the shop from the inside and then left the building through the side door,
 locking it behind him. Earl Scheib employee Mario Leyva arrived for work at about
 17 7:30 the following morning, April 6, 1984, and noticed the shop's front sliding
 18 doors—usually closed and padlocked—were unlocked and wide open. He went
 19 inside and saw Baldwin's dead and partially unclothed body lying on the floor of the
 20 shop's office. Derboghossian arrived for work and summoned the police.

21 The officers who responded found the following crime scene: Baldwin's body was
 22 lying in a pool of blood and had visible wounds on the face, chest, thigh, and right
 23 arm. A cutting of skin and hair from the pubic area (later determined to have been
 24 made after her death) was on the floor about two feet from her head, and a bloody
 25 fingerprint was visible on her right inner thigh. The walls and furniture of the office
 26 were bloody, the office floor safe was open, and the cord of the office telephone had
 27 been cut. The window on the office door was broken, and broken glass fragments
 28 were on the floor. There was blood on the floor outside the office and a footprint was
 visible on the concrete. A 1969 Buick was missing from the shop and was recovered
 a few days later on Valencia Street in San Francisco, with a blood stain on the front
 seat and a bloody tissue inside. A criminalist collected blood samples from the shop
 and the Buick and preserved them in the crime lab freezer.

29 Dr. Jose Ferrer performed an autopsy of Baldwin's body and concluded the cause of
 30 death was a stab wound to Baldwin's chest penetrating her heart, consistent with a
 31 knife wound. Baldwin had cuts on her face and right forearm (the latter possibly a
 32 defensive wound), which could have been caused by a knife or a piece of broken
 33 glass. There were abrasions on Baldwin's right and left elbows, left eye, right knee
 34 and lower back, and a section of skin and hair in her pubic area had been excised by a
 35 post-mortem cutting. Holes in Baldwin's blouse (recovered from the scene) were
 36 consistent with the wounds to her chest and arm. There was no evidence of trauma to
 37 or semen in her vagina.

1 Blood samples from the case were submitted to the San Francisco crime lab for DNA
 2 analysis in 2006. Appellant's DNA matched a blood stain on Baldwin's thigh, blood
 3 stains found on the floor and on broken glass found outside the shop office, a blood
 4 stain in the middle of the garage area of the shop, and bloodstains found inside the
 5 1969 Buick that was stolen from the shop and later recovered. The possibility a
 6 random unrelated person would possess the same DNA profile as the blood on
 7 Baldwin's left thigh was one in 5.7 quadrillion American Caucasians or African
 8 Americans, one in 61 quadrillion California Hispanics, and one in two quadrillion
 9 general population Asians.

10 The fingerprint on Baldwin's thigh had been submitted to the Automated Fingerprint
 11 Identification System in 1984 and received candidates other than appellant for
 12 possible matches, but none of those candidates actually matched the print. In 2006,
 13 the print from Baldwin's thigh was examined by a fingerprint expert with the San
 14 Francisco Police Department who was "completely certain" it was appellant's left
 15 thumb print.

16 On November 8, 2006, Inspectors Pera and Toomey of the San Francisco Police
 17 Department met with appellant regarding Baldwin's murder. They told appellant he
 18 was not under arrest and was free to leave at any time. Appellant acknowledged
 19 working as a painter at the Earl Scheib shop on Bryant Street in the early 1980s, and
 20 as an assistant manager in 1981 and 1982. He claimed no woman worked at Earl
 Scheib when he was there, and said he did not know Baldwin or recognize her photo.
 Told by the inspectors that Baldwin had been murdered in the shop, appellant said he
 had never heard of the crime. Asked why his DNA might have been found at the
 shop, appellant said he had fought with a co-worker there. When asked why his DNA
 was found near Baldwin's body, appellant could not supply an explanation. The
 inspectors returned several days later with a search warrant to obtain oral swabs from
 appellant for DNA testing. Appellant protested, but cooperated in giving the sample.

21 Appellant testified at trial and gave the following explanation of the circumstances
 22 linking him to Baldwin's murder: He had been working as an auto body painter at the
 23 Earl Scheib shop in San Francisco and eventually became the manager of their shop
 24 in Vallejo. On the evening of Baldwin's murder, he was "hustling" on Bryant Street,
 25 or "looking for a way to make a buck." Sometime between 7:45 and 8:15 p.m., he
 noticed the doors of the Earl Scheib shop were open and assumed someone was in
 there painting cars "off the books" and pocketing the money. Though he no longer
 worked at that shop, appellant went inside thinking he might be able to make some
 money. He turned to go into the office when he didn't see anyone in the shop area.

21 Appellant claimed that as he entered the office, he almost stepped on Baldwin's body
 22 and jumped back. He hit the office door with his hand, breaking the glass. He bent
 23 down to look at Baldwin and shook her to see if she would respond, but she did not.
 He walked out of the office "totally confused" with a "thousand thoughts" running
 24 through his head, and at some point noticed he was bleeding. Appellant then drove a
 25 car away from the shop and left it in a tow-away zone on Valencia Street, near the
 home of a relative with whom he could talk. His prior convictions included forgery,
 unarmed bank robbery, five to seven car thefts, and assault with force likely to cause
 great bodily injury.

26 The defense presented the testimony of Brent Turvey, who the court determined had
 27 "the very minimal qualifications" as an expert in crime scene reconstruction.¹ After

28 ¹ Turvey is an author of books on criminal investigation and profiling. He is not a doctor,
 (continued...)

1 reviewing various materials given to him by the defense, Turvey concluded the chain
 2 on the front door to the shop had been broken from the inside. Based on this, he
 3 opined Baldwin either opened the door herself or the killer was already inside the
 4 shop when the doors were locked. Turvey believed the crime scene was staged to
 5 make it look like someone had broken in and attacked Baldwin.

6 Exh. 3 at 2-5.

5 STANDARD OF REVIEW

6 This case is governed by 28 U.S.C. § 2254 as revised by the AEDPA, which provides that
 7 the federal court cannot grant habeas relief unless the state court's ruling "was contrary to, or
 8 involved an unreasonable application of," clearly established United States Supreme Court law,
 9 28 U.S.C. § 2254(d)(1), or was based on an unreasonable determination of the facts, 28 U.S.C. §
 10 2254(d)(2). *Williams v. Taylor*, 529 U.S. 362, 411-413 (2000).

11 "The question under AEDPA is not whether a federal court believes the state court's
 12 determination was incorrect but whether that determination was unreasonable—a substantially
 13 higher threshold." *Schrivo v. Landigan*, 550 U.S. 465, 473 (2007). "As a condition for
 14 obtaining habeas corpus from a federal court, a state prisoner must show that the state court's
 15 ruling on the claim being presented in federal court was so lacking in justification that there was
 16 an error well understood and comprehended in existing law beyond any possibility for fair
 17 minded disagreement." *Harrington v. Richter*, 131 S.Ct. 770, 786-87 (2011). "If this standard is
 18 difficult to meet, that is because it was meant to be." *Id.* at 786.

19 ARGUMENT

20 I. THE TRIAL COURT PROPERLY DENIED PETITIONER'S BATSON/WHEELER MOTION

21 Petitioner contends the trial court erred in denying his *Batson/Wheeler* claim.² Petn.,
 22 Attachment at 1-4.

23 In *Rice v. Collins*, 546 U.S. 333 (2006), the Supreme Court summarized the *Batson*
 24 standard as follows:

25 _____
 26 (...continued)
 27 nurse, psychologist, medical examiner, criminalist, or crime scene technician, and his application
 28 for membership in the Academy of Forensic Sciences was rejected. Although he claimed to be a
 sworn peace officer in Alaska, he has never attended a police academy.

² *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79.

1 A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry.
 2 First, the trial court must determine whether the defendant has made a *prima facie*
 3 showing that the prosecutor exercised a peremptory challenge on the basis of race.
 4 Second, if the showing is made, the burden shifts to the prosecutor to present a race-
 5 neutral explanation for striking the juror in question. Although the prosecutor must
 6 present a comprehensible reason, "[t]he second step of this process does not demand
 7 an explanation that is persuasive, or even plausible;" so long as the reason is not
 8 inherently discriminatory, it suffices. Third, the court must then determine whether
 9 the defendant has carried his burden of proving purposeful discrimination. This final
 10 step involves evaluating "the persuasiveness of the justification" proffered by the
 11 prosecutor, but "the ultimate burden of persuasion regarding racial motivation rests
 12 with, and never shifts from, the opponent of the strike."

13 *Id.* at 338 (citations omitted).

14 The *Collins* court upheld the state court's conclusion that the prosecutor's reasons for
 15 striking the prospective jurors were race-neutral, because "[r]easonable minds reviewing the
 16 record might disagree about the prosecutor's credibility, but on habeas review that does not
 17 suffice to supersede the trial court's credibility determination." *Rice v. Collins*, 546 U.S. at 341-
 18 342; *accord Felkner v. Jackson*, 131 S.Ct. 1305, 1307 (2011) (per curiam) (reversing Ninth
 19 Circuit's grant of the writ where trial court credited prosecutor's race-neutral explanations and
 20 appellate court carefully reviewed the record in upholding the trial court's findings, which
 21 "plainly was not unreasonable").

22 The state court's conclusion that the prosecutor's asserted reasons for a peremptory
 23 challenge were valid is entitled to particular deference. The Supreme Court has declined to
 24 address whether AEDPA review of a third-stage Batson claim falls under 28 U.S.C. § 2254(d)(2)
 25 or (e)(1) or both. *Rice v. Collins*, 546 U.S. at 338-39; *see Thaler v. Haynes*, 559 U.S. 43, 49
 26 (2010) (per curiam) (noting that court should review question under "the federal habeas statute's
 27 standard for reviewing a state court's resolution of questions of fact"). However, the Supreme
 28 Court treated the issue as a presumptively correct factual finding in two pre-AEDPA cases,
Purkett v. Elem, 514 U.S. 765, 769 (1995) (per curiam), and *Hernandez v. New York*, 500 U.S.
 352, 366 (1991), and has consistently described the trial court's determination as a credibility
 finding. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Miller-El v. Cockrell*, 537 U.S. 322,
 338-339 (2003). At the very least, the Supreme Court has emphasized that reviewing courts must
 give "great deference" to the trial court's finding that the prosecutor's reasons for exercising

1 peremptory challenges were genuine. *Batson*, 476 U.S. at 98 n. 21; *Snyder*, 552 U.S. at 477
 2 (“these determinations of credibility and demeanor lie peculiarly within a trial judge’s province,
 3 and we have stated that in the absence of exceptional circumstances, we would defer to the trial
 4 court”).

5 Some Ninth Circuit cases have held that federal habeas review of this question falls under
 6 28 U.S.C. § 2254(e)(1), thus the state court’s factual findings are presumed correct absent clear
 7 and convincing evidence to the contrary. *Mitleider v. Hall*, 391 F.3d 1039, 1050 (9th Cir. 2004).
 8 Other Ninth Circuit cases have held that 28 U.S.C. § 2254(d)(2) applies. *Jamerson v. Runnels*,
 9 713 F.3d 1218, 1224-1225 & n. 1 (9th Cir. 2013); *Briggs v. Grounds*, 682 F.3d 1165, 1170 (9th
 10 Cir. 2012); *Cook v. Lamarque*, 593 F.3d 810, 816 (9th Cir. 2010). At the very least, the Ninth
 11 Circuit views this standard as “doubly deferential,” because “unless the state appellate court was
 12 objectively unreasonable in concluding that a trial court’s credibility determination was supported
 13 by substantial evidence, we must uphold it.” *Briggs*, 682 F.3d at 1170; *accord Aleman v. Uribe*,
 14 723 F.3d 976, 983 (9th Cir. 2013); *Jamerson v. Runnels*, 713 F.3d at 1234.

15 In this case, the California Court of Appeal rejected petitioner’s *Batson/Wheeler* claim.
 16 Specifically, the court held:

17 **I. Batson/Wheeler**

18 The prospective jurors who were questioned during voir dire included three African
 19 Americans. One was seated on the jury, one was excused for cause, and the third,
 20 No. 2810788, was excused by the prosecutor using a peremptory challenge.
 21 Appellant argues the peremptory challenge to Juror No. 2810788 was racially
 22 motivated, and the trial court erred in denying a *Batson/Wheeler* motion brought by
 23 his counsel. We disagree.

24 **A. Relevant Proceedings**

25 During voir dire, Juror No. 2810788 said he lived in the Presidio, was married with
 26 two daughters, had worked for Presidio Trust as a carpenter/glazer for the past 10
 27 years, and had worked in the Presidio generally for 27 years. Defense counsel asked
 28 him, “Being the father of young women, would it impact you to know that this is the
 killing of a woman?” The juror indicated it would not, and defense counsel
 continued, “It wouldn’t bring to mind your daughters and the possibility that they
 might be in this situation, at some point?” Juror No. 2810788 responded, “I would
 like to think that I’ve shown them, to the best that I could, that it would be okay.”
 Asked whether he would have “any kind of an emotional response to the fact that the
 victim in this case is a woman,” the juror stated, “I don’t know the person.”

1 Later in the proceedings, the following interchange occurred between the prosecution
 2 and Juror No. 2810788: "Q: Your turn. Some of the things we were talking about
 3 earl[ier] this morning. First of all, you or any family members that you know of have
 4 any type of distasteful or bad experience with police officers? [¶] A: Not that hadn't
 5 been worked out with the court system. [¶] Q: Tell me about that? [¶] A: As a
 6 teenager, I've had some altercations. I was born and raised here in San Francisco, so
 7 I've lived pretty much everywhere in San Francisco, spent three years in [the]
 8 Tenderloin District. [¶] Q: Keep your voice up. [¶] A: Spent a few years in the
 9 Tenderloin District. Seen a lot of things. [¶] Q: Uh-huh. [¶] A: But where it
 10 involved me, it worked out. [¶] Q: Okay. Do you think – well, was this when you
 11 were a teenager or as a young adult? [¶] A: Young adult. [¶] Q: And have you had
 12 any dealings with the court system? [¶] A: As far as . . . no. [¶] Q: Any type of
 13 felony convictions? Any type of arrests or felonies? [¶] A: No. [¶] Q: I'm sorry, I
 14 didn't hear you. [¶] A: No. [¶] Q: Okay. And in terms of the way you were treated
 15 by the police – or did you have any interactions with the District Attorney's Office?
 [¶] A: I think at age 19, I had to come here. [¶] Q: And if you – stop you there. If
 you don't feel comfortable talking about this in front of people, I mean, we can – it
 can be sensitive issues [sic]. We can go back in chambers and talk about it, too. [¶]
 A: Um, really – I don't think it concerns this case. [¶] Q: Okay. [¶] But, I don't have
 a problem with it. [¶] Q: Okay. I'd kind of like to know about it? [¶] A: It was a – I
 had on my person a martial art weapon, and the officer took offense to that. And we
 ended up going to court, and my lawyer didn't show up. [¶] And they held me in
 contempt, and that's when I had to deal with the District Attorney. Like I said before,
 that it seem[ed] to have worked out. [¶] Q: Tell me what happened. [¶] A: The
 court, the judge, ended up firing my lawyer, holding him in contempt. They let me go
 on three years' probation for possession of a martial art weapons [sic] on my person,
 instead of . . . [¶] Q: And that was how long ago? [¶] A: I was 19. So over 20 years
 ago. [¶] Q: What type of martial arts weapon was it? [¶] A: Various martial art
 weapons. [¶] Q: More than one? [¶] A: Yes."

16 The prosecutor asked to approach the bench and the court, at his request, asked Juror
 17 No. 2810788 to clarify whether he had been put on felony or misdemeanor probation.
 18 The juror said it was misdemeanor probation. The prosecutor then resumed his
 19 questioning of Juror No. 2810788: "Q: [S]orry to have to ask you about that. Other
 20 than that, did you feel this system treated you fairly? [¶] A: Oh, yeah. [¶] Q: Okay.
 21 The fact that you're going to be hearing mainly from police officers here, the fact that
 you had kind of a bad experience when you were 19, are you going to project that
 onto — [¶] A: No." The prosecutor then asked some additional questions about
 Juror No. 2810788's approach to evaluating the credibility of witnesses, his views on
 the burden of proof beyond a reasonable doubt, and circumstantial evidence. He later
 used his sixth peremptory challenge to excuse Juror No. 2810788.

22 Defense counsel did not immediately object to the prosecutor's peremptory challenge
 23 of Juror No. 2810788, but brought a *Batson/Wheeler* motion during an off-the-record
 24 chambers conference held after the morning courtroom session at which the challenge
 was exercised. *Voir dire* continued, and after the alternate jurors had been selected
 and sworn, the parties memorialized the chambers conference on the record.

25 Defense counsel complained the prosecutor had extensively questioned Juror No.
 26 2810788 about his arrest for weapon possession when he was 19 years old, whereas
 27 he had not asked similar questions of or excused two Caucasian jurors who had been
 28 arrested for marijuana possession and some sort of civil disobedience. Counsel asked
 the court to conduct a comparative analysis of these other two jurors and appellant,
 and suggested the differential treatment during questioning was based on appellant's
 race.

1 The prosecutor responded that Juror No. 2810788 had mentioned some encounters
 2 with the police but said they were not relevant, and he was concerned the weapons
 3 charge the juror described might have been a felony (which could mean the juror was
 4 ineligible for jury service and had lied to the Jury Commissioner). The prosecutor
 5 asked the court to ask the juror whether the conviction was a misdemeanor or a felony
 6 because he did not want to alienate the juror in the event he decided to leave him on
 7 the panel. As to the other two jurors with a history of police contacts, the prosecutor
 8 explained, “Juror number five said that, at one point in time, he got arrested for being
 9 in a car, and there was marijuana in the car. And, I mean, a far cry different from
 10 having marijuana in a car, in terms of being armed with weapons. [¶] . . . then with
 11 regards to the last juror, she frankly admitted, and freely admitted, what had happened
 12 in terms of her being arrested by the police officers. [¶] Entirely different than being
 13 arrested with some type of weapons where she said that she was engaged in civil
 14 disobedience on two different occasions.”

15 The trial court indicated it did not believe the *Batson/Wheeler* motion was timely, as
 16 it was made after Juror No. 2810788 had been excused and had left the courtroom. It
 17 continued, “[E]ven assuming, for purposes of argument that [the motion] was timely,
 18 the fact of his – the fact that the conviction had been for a weapons-related charge,
 19 multiple weapons, in a case where there’s an allegation of murder that was a murder
 20 with a weapon, and the fact that the conviction could have been a felony I think
 21 warranted the further examination that the District Attorney did of [Juror No.
 22 2810788] in trying to clarify what these issues were. [¶] And so in comparison
 23 related to the other jurors, the fact of the political demonstration of disturbing the
 24 peace-related issues . . . or the marijuana-related issues. . . I can see that those present
 25 different kinds of issues. [¶] So in any comparative analysis, I don’t see that there
 26 was any problem with the District Attorney’s focus on [Juror No. 2810788] going
 27 into that inquiry.”

28 The court asked the prosecutor if he had any other comments on his reasons for
 29 excusing Juror No. 2810788, and the prosecutor responded, “Well, the other reason is
 30 something I think he said yesterday when [defense counsel] indicated that – asked
 31 him about the fact that he had two daughters . . . that there was a woman who was
 32 murdered in this case, that this was a crime of violence against women, and he was
 33 very quick to say, ‘I don’t know that woman. It doesn’t have any effect on me.’ [¶] I
 34 mean, that type of reaction, to me, is kind of a cold reaction. I would think that
 35 anybody that has two daughters would have some type of reaction to the fact that,
 36 ‘Well, yeah, it does concern me, because I have two daughters.’ [¶] Just [the] cold,
 37 impersonal nature of that answer also concerned me. [¶] You know, if he would have
 38 said, ‘Well, yeah, I do have some concerns, but I can put it aside.’ He didn’t even say
 39 that. So that was another thing that really concerned me when I thought about it
 40 yesterday.”

41 The court found no pattern of exclusion against African American jurors, concluded
 42 the challenge to Juror No. 2810788 was not based on his race, and found race neutral
 43 reasons for excusing him from jury service on this case. It denied the *Batson/Wheeler*
 44 motion as untimely and on its merits.

45 **B. Analysis**

46 As discussed in *Batson, supra*, 476 U.S. 79 and *Wheeler, supra*, 22 Cal.3d 258, both
 47 the state and federal Constitutions bar peremptory challenges that are based on a
 48 juror’s race, ethnicity, or membership in a similar cognizable class. (*People v. Lenix*
 49 (2008) 44 Cal.4th 602, 612 (*Lenix*).) A defendant who suspects a juror has been
 50 challenged for a discriminatory reason must bring a motion under *Batson/Wheeler*, at

which point the trial court will analyze the claim using a familiar three-prong test. First, it must determine whether the defendant has made a prima facie showing the prosecutor exercised a peremptory challenge based on race, ethnicity or some other impermissible ground. Second, if the showing is made, the burden then shifts to the prosecutor to demonstrate the challenge was exercised for a neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination by evaluating the proffered reasons and determining whether they are legitimate or pretextual. (*Lenix*, at p. 612.)

Appellant suggests this is a “first prong” case, and argues the trial court erred in finding no prima facie case of discrimination. The People respond that the court’s ruling was in fact based on the second and third prongs of the *Batson/Wheeler* analysis. We agree with the People because the court made no express finding regarding a prima facie case of discrimination and resolved the issue by referring to the prosecutor’s stated reasons for the challenge and defense counsel’s comparative analysis of other jurors with a history of arrests. (*People v. Lewis* (2008) 43 Cal.4th 415, 470-471 [by requesting prosecutor to state reasons for peremptory challenge, court implicitly found prima facie case; in any event, by offering reasons, the prosecutor rendered moot the question of whether a prima facie case existed]; *People v. Bonilla* (2007) 41 Cal.4th 313, 350 [use of comparative analysis not appropriate when determining whether defendant made first-prong, prima facie showing of discrimination].)

Having concluded this is a second- and third-prong case, we review the trial court’s determination that the challenge was not discriminatory for substantial evidence, presuming the prosecutor used the peremptory challenge in a constitutional manner and “giv[ing] great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses.” (*People v. Burgener* (2003) 29 Cal.4th 833, 864 (*Burgener*).) A reason does not need to be well-founded so long as it is not discriminatory. (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) “[E]valuation of the prosecutor’s state of mind based on demeanor and credibility lies “peculiarly within a trial judge’s province.”” (*People v. Stevens* (2007) 41 Cal.4th 182, 198.)

Substantial evidence supports the trial court’s denial of the *Batson/Wheeler* motion. The prosecutor explained that he excused Juror No. 2810788 due to concerns about his weapons conviction. A prospective juror’s arrest or criminal history or negative experience with law enforcement can serve as a valid basis for a peremptory challenge. (*People v. Lomax* (2010) 49 Cal.4th 530, 573; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125.)

A comparative analysis of the responses of two seated Caucasian jurors with prior arrests does not alter our conclusion. The first, Juror No. 2945120, was asked about contacts with police officers and explained, “Well, I was arrested when I was 18 for being in a car where they found a small amount of marijuana. So, distasteful experience. Nothing the officer did wrong. I don’t think the officer did anything wrong. He was just doing his job.” The juror assured the parties nothing about the experience would prevent him from being fair and impartial. Marijuana possession is a nonviolent offense and the prosecutor could reasonably conclude it was not the equivalent of a prior arrest for illegal weapons, especially in a murder case where a weapon, but no drugs, were involved. (See *People v. Williams* (2006) 40 Cal.4th 287, 311-312 [the marijuana-related arrest of a seated juror’s son was not comparable to the extensive criminal history of excused juror’s family, which included a rape prosecution resulting in acquittal].)

1 The second seated juror with a history of police contacts, No. 2665378, had been
 2 arrested during a civil disobedience demonstration regarding housing about 10 years
 3 earlier and had found the San Francisco police officers she dealt with to be “very
 4 courteous and very patient.” In 1967, the juror had been convicted of disturbing the
 5 peace due to her participation in a protest at the Oakland Induction Center, which
 6 consisted of singing Christmas carols. She spent 20 days in jail and described most of
 7 the jail guards as “jaded,” but found one to be very kind. Finally, Juror No. 2665378
 indicated the only bad experience she had ever had with a San Francisco police
 officer was when the head of the San Francisco Police Officers Association wrote a
 letter accusing the San Francisco Labor Council (to which she belonged) of being a
 terrorist organization, an accusation she attributed to political hyperbole. This juror’s
 contacts with law enforcement were a product of her nonviolent political activism, a
 far different thing than a conviction for possessing multiple illegal weapons.

8 Appellant suggests a discriminatory intent can be gleaned from the prosecutor’s
 9 “belated” reliance on appellant’s “cold” response (“I don’t know the person”) when
 10 asked whether, as the father of two daughters, he would be affected by the fact the
 11 victim in this case was a woman. Appellant suggests this justification was pretextual
 and notes a seated juror, No. 29255598, simply answered “no” when asked whether
 he would be concerned about the personal safety of his wife and daughter considering
 the charged crime involved violence against a woman.

12 Comparative juror analysis based on the appellate record has inherent limitations.
 13 “On appellate review, a voir dire answer sits on a page of transcript. In the trial court,
 however, advocates and trial judges watch and listen as the answer is delivered.
 14 Myriad subtle nuances may shape it, including attitude, attention, interest, body
 language, facial expression and eye contact. ‘Even an inflection in the voice can
 15 make a difference in the meaning.’ ” (*Lenix, supra*, 44 Cal.4th at p. 622.) While we
 16 do not have the benefit of being able to compare the demeanors of Juror No. 2810788
 and the seated juror who commented that he would not be afraid for his wife and
 17 daughters, even the bare record suggests a difference in tone. The seated juror simply
 18 stated he would not fear for his family’s personal safety; the excused juror said he
 would not have any kind of an emotional response to the case, because he did not
 know the victim. The first response indicates a lack of fear of appellant, the second
 suggests emotional indifference to the victim’s circumstances.

19 Because the trial court’s denial of the *Batson/Wheeler* motion on its merits is
 20 supported by substantial evidence, appellant is not entitled to reversal of the judgment
 on this ground. (*Burgener, supra*, 29 Cal.4th at p. 864.)

21 Exh. 3 at 5-12.

22 Petitioner contends the trial court erred in denying his *Batson/Wheeler* claim, as to the
 23 prosecutor’s challenge of a single African-American prospective juror. Petn., Attachment at 1-4.

24 Contrary to petitioner’s claim, there was not a pattern of exclusion of African-American
 25 individuals from the jury, and specifically there was no race-based exclusion of Prospective Juror
 26 No. 2810788. Instead, there were race neutral reasons for which the prospective juror could be
 27 excused from service in the case. Also, the additional questions for Prospective Juror No.

1 2810788 were warranted because he had a possible felony conviction for a “weapons-related-
 2 charge” in a case where the charge was murder with a weapon. Exh. 2A at 355.³

3 The prosecutor first asserted that he excused Juror No. 2810788 because of his conviction
 4 for possession of weapons. The state court reasonably concluded that this was valid reason to
 5 challenge a juror in a murder case involving weapons. The prosecutor next asserted that he
 6 excused the juror because of his “cold” response to the question about whether he would be
 7 affected by the facts of this case because he had two daughters. The Supreme Court has
 8 acknowledged that race-neutral reasons for peremptory challenges “often invoke a juror’s
 9 demeanor.” *Snyder v. Louisiana*, 552 U.S. at 477; *see Thaler v. Haynes*, 559 U.S. at 44-45
 10 (juror’s demeanor and body language showed she failed to take capital case seriously); *Rice v.*
 11 *Collins*, 546 U.S. at 336 (juror rolled her eyes in response to question from court); *Briggs v.*
 12 *Grounds*, 682 F.3d at 1178 (juror’s demeanor and flippant responses showed he did not take
 13 process seriously). The state court reasonably concluded this was also a valid reason.

14 Further, the state court reasonably determined that a comparison of Juror No. 2810788 to
 15 other jurors who were not challenged failed to demonstrate that the challenge was pretextual.
 16 “Where the state court conducted comparative analysis and determined that the prosecutor did not
 17 exercise her peremptory challenges in a discriminatory manner, AEDPA deference applies and
 18 we need not undertake comparative analysis *de novo*.” *Briggs v. Grounds*, 682 F.3d at 1171 n.6.

19 As the California Court of Appeal found, petitioner’s attempt to compare the prosecutor’s
 20 interaction with Prospective Juror No. 2810788 and his interaction with other jurors is misplaced.
 21 For example, Prospective Juror No. 2945120 quickly summarized her legal history and the
 22 prosecutor had no need for further inquiries. Also, Prospective Juror No. 2945120 was not
 23 prosecuted for possession of weapons. Instead, she was arrested for being a car where a small
 24 amount of marijuana was found. Exh. 2A at 82-83. Similarly, Prospective Juror No. 2665378
 25 had previous arrests for civil disobedience and disturbing the peace. She was a union and
 26 political activist, and had many experiences with law enforcement over the years. She readily

27 _____
 28 ³ Exhibit 2A refers to the Augmented reporter’s transcript.

1 described those experiences without the need for a lot of questions from the prosecutor. Exh. 2A
 2 at 323-327.

3 Prospective Juror No. 2810788, on the other hand, told defense counsel that he did not have
 4 any negative experiences with the police. He then told the prosecutor that he did have such an
 5 experience, but it was resolved in the courts. When asked about the experience, the Juror vaguely
 6 described “some altercations.” When asked again for details, the Juror stated it was not relevant
 7 to the case. In other words, Prospective Juror No. 2810788 did not “quickly summarize” or
 8 “readily describe” his legal history. Instead, the prosecutor had to ferret out each and every detail
 9 with a question until he finally had a complete picture of the juror’s experience with law
 10 enforcement and the criminal justice system.

11 Further, the prosecutor left one African-American juror on the jury, which supported the
 12 trial court’s finding. Exh. 2A at 353; *Gonzalez v. Brown*, 585 F.3d 1202, 1210 (9th Cir. 2009)
 13 (the fact that black jurors remained on the panel was indicative of non-racial motive for
 14 challenges); *Turner v. Marshall*, 121 F.3d 1248, 1254 (9th Cir. 1997) (while not dispositive, “the
 15 fact that the prosecutor accepted four African-Americans on the jury may be considered
 16 indicative of a nondiscriminatory motive”); *Palmer v. Estelle*, 985 F.2d 456, 458 (9th Cir. 1993)
 17 (same).

18 In sum, the prosecutor had valid race-neutral reasons for excusing prospective Juror No.
 19 2810788. The trial court accepted those reasons, and that factual finding was not unreasonable
 20 under either § 2254(d)(2) or § 2254(c)(1). The California Court of Appeal’s determination on
 21 review is likewise entitled to appropriate deference. *Briggs v. Grounds*, 682 F.3d at 1171). Since
 22 there was no purposeful discrimination during jury selection in this case, the state court’s
 23 determination was neither contrary to, nor an unreasonable application of established Supreme
 24 Court precedent. Petitioner’s claim fails.

25 **II. THE TRIAL COURT DID NOT ERR IN ADMITTING THE AUTOPSY REPORT OR THE**
TESTIMONY BY A PATHOLOGIST WHO DID NOT WRITE THE REPORT

1 Petitioner contends that his Sixth Amendment right was violated when the trial court
 2 allowed the medical examiner to testify regarding the result of the autopsy that was conducted in
 3 1984 and admitted the autopsy report as a business record. Petn., Attachment at 4-6.

4 The California Court of Appeal rejected petitioner's claim. Specifically, the court held:

5 **II. Autopsy Report**

6 Appellant argues he was deprived of his constitutional right to confrontation (U.S.
 7 Const., 6th Amend.) because the court admitted evidence of an autopsy report
 8 prepared by a pathologist who did not testify at trial, and allowed a medical examiner
 called as a prosecution witness to offer opinions based on that report. We disagree.

9 In *Crawford v. Washington* (2004) 541 U.S. 36, 59 (*Crawford*), the United States
 10 Supreme Court held a defendant's federal constitutional right to confrontation
 prohibits the use of "testimonial statements" of a witness who does not appear at trial
 11 unless the witness is unavailable to testify and the defendant had a prior opportunity
 12 for cross-examination. Though the court did not—and has not—supplied a bright-
 13 line rule for what makes a statement testimonial, such statements "have two critical
 14 components. First, to be testimonial the statement must be made with some degree of
 15 formality or solemnity. Second, the statement is testimonial only if its primary
 16 purpose pertains in some fashion to a criminal prosecution." (*People v. Dungo*
 17 (2012) 55 Cal.4th 608, 619 (*Dungo*).) The United States Supreme Court has since
 18 considered the meaning of "testimonial" as it relates to official reports offered as
 19 evidence when the person who prepared the report does not testify at trial. (See
 20 *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 311 [laboratory's sworn
 21 "certificates of analysis" stating that a substance was cocaine was testimonial];
 22 *Bullcoming v. New Mexico* (2011) 564 U.S. ____ [131 S.Ct. 2705] [certified laboratory
 23 report regarding alcohol content of blood sample was testimonial]; *Williams v. Illinois*
 24 (2012) 567 U.S. ____ [132 S.Ct. 2221] [plurality of the court concluded an expert's
 25 testimony regarding a DNA profile by laboratory analyst who did not testify at trial
 26 did not violate Confrontation Clause].)

27 The medical examiner who prepared the autopsy report in this case, Dr. Ferrer, had
 28 died by the time of appellant's trial in 2011. Over defense objection, the court
 allowed prosecution witness and chief medical examiner Dr. Amy Hart to relate the
 factual findings of the report and to rely on those findings in support of her own
 opinion regarding the cause and time of Baldwin's death. The court also admitted the
 report into evidence, finding it to be admissible as a business or official record.
 (Evid. Code, §§ 1271, 1280.)

27 It is not necessary in this case to delve into the intricacies of the Confrontation
 28 Clause. Apart from the autopsy report, the evidence was overwhelming that Baldwin
 was attacked, stabbed, and bled to death. The extent of her injuries and cause of her
 death are not in dispute, and any error relating to that aspect of the evidence would be
 harmless beyond a reasonable doubt. (*People v. Pearson* (2013) 56 Cal.4th 393, 463-
 464; *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) Appellant's claim
 of prejudicial error is limited to a fairly narrow aspect of Dr. Hart's testimony—her
 opinion regarding the time of death.

27 Based on the liver temperature recorded by Dr. Ferrer in the autopsy report, Dr. Hart
 28 estimated the actual time of Baldwin's death as between 7 and 22 hours before the
 liver temperature was taken. She indicated that lividity (coloration of the body based

1 on the settling of the blood) could sometimes assist in timing a death, but she did not
 2 in this case know the conditions or temperature of the area where Baldwin's body was
 3 found. Asked by the prosecutor to assume the body was in a cold warehouse on a
 4 concrete floor all night, Dr. Hart testified the death could have occurred between
 5 10:00 p.m. and 2:00 a.m., though she acknowledged this range was just an estimate.
 6 The 10:00 p.m. to 2:00 a.m. window conflicts with appellant's own testimony that he
 7 entered the Earl Scheib shop and found Baldwin already dead between 7:45 p.m. and
 8 8:15 p.m.
 9

10 Dr. Hart's testimony regarding the time of death was based on the liver temperature
 11 recorded in the autopsy report and photographs showing the body's postmortem
 12 lividity. In *Dungo, supra*, 55 Cal.4th at page 619, the California Supreme Court
 13 concluded a pathologist's observations in an autopsy report regarding the condition of
 14 a victim's body are not testimonial within the meaning of *Crawford*. Because the
 15 only aspect of the report on which the allegedly prejudicial testimony by Dr. Hart was
 16 based is not testimonial, her opinion on this point did not violate the Confrontation
 17 Clause.

18 Exh. 3 at 12-14.

19 In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, a 5-4 decision, the Supreme Court held
 20 that a sworn certificate from a crime lab analyst identifying a controlled substance qualified as
 21 testimonial evidence, because it was created for the purpose of establishing or proving some fact
 22 at trial, and was functionally identical to in-court testimony. In *Bullcoming v. New Mexico*, 131
 23 S.Ct. 2705, a 5-4 decision, the Supreme Court held that a certificate from a crime lab analyst
 24 containing the result of a blood alcohol test, which was introduced through the testimony of a
 25 different analyst who did not perform the test, was sufficiently "formalized" to constitute
 26 testimonial evidence. In a concurring opinion, Justice Sotomayor emphasized that the "primary
 27 purpose" of the certificate was to create a substitute for trial testimony. *Id.* at 2722 (Sotomayor,
 28 J., concurring). However, she observed, "We would face a different question if asked to
 determine the constitutionality of allowing an expert witness to discuss others' testimonial
 statements if the testimonial statements were not themselves admitted as evidence." *Id.*

29 In *Williams v. Illinois*, 132 S.Ct. 2221, an expert relied on a lab report creating a DNA
 30 profile from semen in a rape victim's vaginal swab to testify that the profile matched defendant's
 31 DNA as derived from a current blood sample. The *Williams* three-judge plurality answered
 32 Justice Sotomayor's question by concluding that expert testimony based on an out-of-statement
 33 offered solely for the purpose of explaining an assumption on which the expert's opinion rests is
 34 not offered for the truth, and thus falls outside the scope of the Confrontation Clause. *Id.* at 2228.

1 The plurality also found that the outside lab report was not prepared for the primary purpose of
 2 accusing a targeted individual. *Id.* at 2243. In a concurring opinion, Justice Breyer stated:

3 to bar admission of the out-of-court records at issue here could undermine, not fortify,
 4 the accuracy of factfinding at a criminal trial. Such a precedent could bar the
 5 admission of other reliable case-specific technical information such as, say, autopsy
 6 reports. Autopsies, like the DNA report in this case, are often conducted when it is
 7 not yet clear whether there is a particular suspect or whether the facts found in the
 8 autopsy will ultimately prove relevant in a criminal trial. Autopsies are typically
 9 conducted soon after death. And when, say, a victim's body has decomposed,
 10 repetition of the autopsy may not be possible. What is to happen if the medical
 11 examiner dies before trial? Is the Confrontation Clause effectively to function as a
 12 statute of limitations for murder?

13 *Id.* at 2251 (Breyer, J., concurring, citations and quotations omitted).

14 In the wake of these fractured opinions, the answer to the question whether autopsy reports
 15 and expert testimony based on a report prepared by a different expert should be considered
 16 testimonial for purposes of the Confrontation Clause remains opaque. As several justices
 17 candidly acknowledged in *Williams*, "The several different opinions filed today embody several
 18 serious, but different, approaches to the difficult general question. Yet none fully deals with the
 19 underlying question as to how, after *Crawford*, Confrontation Clause 'testimonial statement'
 20 requirements apply to crime laboratory reports." *Id.* at 2248 (Breyer, J., concurring); *id.* at 2277
 21 (the five justices in the majority "have left significant confusion in their wake. What comes out of
 22 four Justices' desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined
 23 with one Justice's one-justice view of those holdings, is—to be frank—who knows what.")
 24 (Kagan, J., dissenting); *see Hensley v. Roden*, 755 F.3d 724, 733-734 (1st Cir. 2014) ("disparity
 25 of treatment has reigned" among lower courts following Supreme Court decisions); *United States
 26 v. Mallay*, 712 F.3d 79, 95 (2d Cir. 2013) (because "[n]o single rationale of the *Williams* case
 27 enjoys the support of a majority of the Justices," the problem is "intractable"); *People v. Dungo*,
 28 55 Cal.4th 608, 618 (2012) ("These widely divergent views [in *Williams*], none of which was able
 to garner majority support—as reflected in the four-one-four decision—highlight the complexity
 of the issue."); *id.* at 622 ("The question of what out-of-court statements are and are not
 testimonial has divided the justices of the United States Supreme Court, whose decisions have not

1 yet yielded a clear definition or test.”) (Werdegar, J., concurring); *id.* at 628 (lack of majority in
 2 *Williams* “makes it difficult to determine what to make of that decision”) (Chin, J., concurring).

3 The inescapable conclusion from this confusion is that the Supreme Court has not clearly
 4 established a definitive rule that must always be applied by the state courts. The state court’s
 5 application of a principle whose “precise contours” are “unclear” cannot be objectively
 6 unreasonable. *White v. Woodall*, 134 S.Ct. 1697, 1705 (2014); *accord Harrington v. Richter*, 131
 7 S.Ct. at 786 (“it is not an unreasonable application of clearly established Federal law for a state
 8 court to decline to apply a specific legal rule that has not been squarely established by this
 9 Court”). Accordingly, habeas relief is unavailable under 28 U.S.C. § 2254(d).

10 Moreover, the state court reasonably concluded that Dr. Hart’s testimony regarding the time
 11 of death was not testimonial within the meaning of *Crawford*. Dr. Hart relied on the liver
 12 temperature and photos showing lividity in the autopsy report to reach her own independent
 13 conclusion about the estimated time of death. As both the *Williams* plurality and the California
 14 Supreme Court in *Dungo* found, expert testimony based on an out-of-court statement that
 15 explains the basis for the expert’s opinion does not violate the Confrontation Clause. As for the
 16 autopsy report itself, a number of lower courts have found that such reports are not testimonial.
 17 *See Hensley v. Roden*, 755 F.3d at 732-735; *United States v. Mallay*, 712 F.3d at 88-102;
 18 *McNeiece v. Lattimore*, 501 Fed.Appx. 634, 636 (9th Cir. 2012). Finally, any error was harmless
 19 because the cause of death was not in dispute. *See Brecht v. Abrahamson*, 507 U.S. 619, 637
 20 (1993).

21 Since the state court’s determination was neither contrary to, nor an unreasonable
 22 application of established Supreme Court precedent, petitioner’s claim fails.

23 **III. NO INSTRUCTIONAL ERROR OCCURRED**

24 Petitioner contends his right to due process was violated when the trial court erroneously
 25 sanctioned defense counsel by reading a late discovery jury instruction. Petn. at 7-12.

26 A claim of state instructional error can be the basis of federal habeas relief only if it “so
 27 infected the entire trial that the resulting conviction violates due process.” *Estelle v. McGuire*,
 28 502 U.S. 62, 72 (1991). The test for constitutional error is whether there is a “reasonable

1 likelihood" the jury misapplied the instructions. *Id.* To make this assessment, the challenged
 2 instruction must be evaluated in light of the instructions as a whole and the evidence introduced at
 3 trial, *id.*, as well as the arguments of counsel, all of which may clarify the charge to the jury.
 4 *Middleton v. McNeil*, 541 U.S. 433, 438 (2004) (per curiam). The federal habeas court must defer
 5 to a state court's reasonable application of these principles. *Smith v. Spisak*, 558 U.S. 139 (2010);
 6 *Waddington v. Sarausad*, 555 U.S. 179, 191 (2009). If error occurred, the federal habeas court
 7 must separately determine whether it had a substantial or injurious effect on the verdict.
 8 *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (per curiam) (citing *Brecht v. Abrahamson*, 507
 9 U.S. at 637.

10 The California Court of Appeal assumed for the sake of argument that the late discovery
 11 jury instruction should not have been given to the jury, and concluded that any instructional error
 12 was harmless error under the state law standard. Specifically, the court held:

13 III. CALCRIM No. 306

14 Appellant argues the trial court erred in giving CALCRIM No. 306, regarding the
 15 effect of delayed discovery, as a sanction for the late disclosure of the defense expert
 on crime scene reconstruction. We conclude any error was harmless.

16 Under the reciprocal discovery provisions of the Penal Code, the defense must
 17 disclose to the prosecution the names and addresses of persons it "intends to call as
 18 witnesses at trial" and any reports they made. (§ 1054.3, subd. (a).) The phrase
 19 "intends to call" means any person the party reasonably anticipates it is likely to call
 20 at trial. (*In re Littlefield* (1993) 5 Cal.4th 122, 130.) The disclosure must be made 30
 days before trial or, if counsel becomes aware of a witness after that time,
 immediately. (§ 1054.7.) If disclosure is not timely made as to any particular
 witness, the trial court may inform the jury of the failure to disclose. (§ 1054.5, subd.
 (b).)

21 The witness list filed by the defense did not include its crime scene reconstruction
 22 expert, Brent Turvey, and defense counsel did not disclose his name to the
 23 prosecution at least 30 days before trial. Counsel provided Turvey's name and
 24 curriculum vitae to the prosecutor on April 6, 2011, five days before jury selection
 began, and identified him as a "possible expert." On the day before the prosecution
 intended to rest its case, defense counsel provided the prosecutor with a copy of a
 report prepared by Turvey. The prosecutor asked that Turvey be excluded as a
 25 witness because the late disclosure made it difficult to adequately prepare.

26 Defense counsel advised the court she had not determined a crime scene
 27 reconstruction expert was necessary until appellant, on the eve of trial, decided to
 28 testify and acknowledge his presence at the auto paint shop on the night of the
 murder. Until that point, the defense strategy had been to challenge the validity of the
 physical evidence linking appellant to the crime scene. Counsel represented to the
 court that once appellant decided to testify, it took her almost two weeks to get

1 approval from her office to speak to the expert. Defense counsel said she disclosed
 2 her expert's name as soon as she knew he would be called as a witness, and provided
 3 a copy of the expert's report the morning after she received it.

4 The trial court ruled the delay was not justified, and the late disclosure of the report
 5 was a violation of the discovery rules. It declined to exclude Turvey as a witness, and
 6 instead instructed the jury with CALCRIM No. 306: "Both the People and the
 7 defense must disclose their evidence to the other side before trial, within the time
 8 limits set by law. Failure to follow this rule may deny the other side the chance to
 9 produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.
 10 [¶] The attorney for the defense failed to disclose witness Brent Turvey's report
 11 within the legal time period. [¶] In evaluating the weight and significance of that
 12 evidence, you may consider the effect, if any, of that late disclosure. [¶] However,
 13 the fact that the defendant's attorney failed to disclose evidence within the legal time
 14 period is not evidence that the defendant committed a crime."

15 We assume for the sake of argument that the timing of the disclosures by defense
 16 counsel did not violate the discovery statutes, and that CALCRIM No. 306 should not
 17 have been given to the jury. The erroneous giving of CALCRIM No. 306 is analyzed
 18 for prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836,
 19 which requires reversal only when it is reasonably probable the jury would have
 20 reached a result more favorable to the defendant if the instruction had not been given.
 21 (*People v. Lawson* (2005) 131 Cal.App.4th 1242, 1249, fn. 7 [*Watson* standard
 22 applied to error in instructing with CALJIC No. 2.28, the predecessor of CALCRIM
 23 306]; *see also People v. Cabral* (2004) 121 Cal.App.4th 748, 753.)

24 CALCRIM No. 306 made it clear the jury could only consider the effect of the late
 25 disclosures for the purpose of evaluating Turvey's testimony. If fully credited, the
 26 jury could have inferred from Turvey's testimony that Baldwin allowed her assailant
 27 into the building or was locked in the building with him, and the assailant later
 28 attempted to make the crime scene look like a break-in. But Turvey's testimony did
 29 nothing to identify any particular person other than appellant as the assailant. The
 30 physical evidence linking appellant to the crime was overwhelming, notwithstanding
 31 his claim that he came upon Baldwin's body by happenstance and left blood at the
 32 scene after cutting his hand on the office door. It is not reasonably probable appellant
 33 would have obtained a more favorable result if CALCRIM No. 306 had not been
 34 given.

35 Appellant argues that CALCRIM No. 306 is defective, claiming it invites the jury to
 36 speculate about prejudice caused by the late disclosure when there was no evidence
 37 regarding its actual effect on the prosecution's case. He relies on cases criticizing a
 38 former version of CALJIC No. 2.28 concerning late discovery, and argues CALCRIM
 39 No. 306 is similarly deficient. We reject the argument. (*People v. Riggs* (2008) 44
 40 Cal.4th at 248, 307.)

41 Exh. 3 at 14-16.

42 "[T]he *Watson* harmless error standard is the standard applied by the California state
 43 appellate courts in reviewing non-constitutional magnitude, trial type errors." *Bains v. Cambra*,
 44 204 F.3d 964, 971 n. 2 (9th Cir. 2000); *accord Ortiz v. Yates*, 704 F.3d 1026, 1033-1034 & n. 4
 45 (9th Cir. 2012). Accordingly, by finding the instructional error harmless under *Watson* in this
 46

1 case, the state court determined that the error did not amount to a federal constitutional violation.
 2 The mere fact that the instruction was incorrect under state law is not a basis for federal habeas
 3 relief. *Estelle v. McGuire*, 502 U.S. at 71-72; *Middleton v. McNeil*, 541 U.S. at 437 (no
 4 constitutional error where trial court gave one admittedly incorrect instruction and three correct
 5 instructions on unreasonable self-defense); *see Fetterly v. Paskett*, 15 F.3d 1472, 1479-1480 (9th
 6 Cir. 1994) (“the demonstration of an error under state law does not ipso facto equate to the
 7 demonstration of a denial of due process under the Constitution”). A petitioner must show “not
 8 merely that the instruction is undesirable, erroneous, or even ‘universally condemned,’ but that it
 9 violated some [constitutional] right.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

10 The state court’s conclusion that no due process violation occurred was reasonable. Here,
 11 the challenged instruction limited jury inferences by directing the jurors to consider the effect, if
 12 any, of the late disclosure when evaluating the weight and significance of the evidence. Exh. 1 at
 13 1475-1476. Also, the instruction did not permit any direct inference leading from the discovery
 14 violation to petitioner’s guilt, and it advised the jury that it was counsel, not petitioner, who failed
 15 to timely disclose the report. *People v. Riggs*, 44 Cal.4th at 307-308. In addition, petitioner’s
 16 guilt was established by his admission that he was in the auto painting shop that night, the
 17 inconsistency between the time he claimed to be in the shop and Baldwin’s time of death, his
 18 DNA extracted from the bloody fingerprint on Baldwin’s thigh, his DNA on the blood stains on
 19 the floor, the broken glass outside the office, the blood stain in the middle of the garage,
 20 Baldwin’s blood found in the Buick Elecktra that petitioner admitted he stole on the night of the
 21 murder, his lies to the police, and his testimonial inconsistencies and falsehoods before the jury.
 22 In light of the strong and largely undisputed evidence of petitioner’s guilt and the minor
 23 significance of the instruction regarding the discovery violation, there is no reasonable likelihood
 24 that the challenged instruction, even if erroneous, affected the outcome or fairness of petitioner’s
 25 trial. For the same reasons, any error was harmless under *Brech*.

26 Since the state court’s determination was neither contrary to, nor an unreasonable
 27 application of established Supreme Court precedent, petitioner’s claim fails.
 28

1 **IV. PETITIONER WAS NOT IMPROPERLY CROSS-EXAMINED ABOUT HIS POST-ARREST
2 SILENCE**

3 Petitioner contends that his rights were violated when the trial court allowed questions
4 regarding his silence post arrest after he invoked his right to counsel. Petn., Attachment at 12-17.

5 The California Court of Appeal disagreed with petitioner's claim. Specifically, the state
6 court held:

7 **IV. Cross-Examination About Pre-*Miranda* Silence**

8 Appellant contends the judgment must be reversed because the prosecution was
9 permitted, over defense objection, to ask him on cross-examination about his post-
10 arrest, pre-*Miranda* silence after he was taken into custody. We conclude any such
11 error, assuming it has been preserved for appeal, was harmless beyond a reasonable
12 doubt. (*People v. Cunningham* (2001) 25 Cal.4th 926, 994 [violations of a
13 defendant's Fifth Amendment rights evaluated under harmless-beyond-a-reasonable-
14 doubt standard of *Chapman, supra*, 386 U.S. at p. 24].)

15 This issue arises in the following context: Defendant voluntarily spoke to Inspectors
16 Pera and Toomey on November 8, 2006, and denied knowing anything about the
17 murder of Joan Baldwin. The inspectors returned eight days later on November 16,
18 2006, with a search warrant requiring appellant to provide a DNA swab. After he
19 provided the swab, appellant was taken into custody. During cross-examination, the
20 prosecutor asked appellant whether he then told the inspectors the version of events
21 he had told the jury, and appellant responded, "I believe I'd already asked for an
22 attorney." Defense counsel objected. Asked by the prosecutor whether he was told
23 he was being detained for Baldwin's murder, appellant testified that officers from a
24 "separate entity" had handcuffed him, and he was not arrested for the murder until
25 two days later. The prosecutor asked appellant whether he told those officers the
26 story he had told the jury, and appellant responded, "No. As I told you earlier, I'd
27 asked for a lawyer." After this interchange about appellant's request for a lawyer was
28 repeated a couple of times, appellant acknowledged he never spoke to officers in the
 squad car, on his way to county jail, or at the jail itself. According to Inspector Pera,
 appellant did not request an attorney when the DNA swab was taken.

29 Defense counsel argued that the prosecutor's questions about appellant's failure to
30 tell his story violated *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), which precludes
31 evidence of a defendant's post-arrest silence following an invocation of his rights
32 under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). The prosecutor noted that
33 appellant had been picked up by parole officers on November 18, 2006, the day he
34 provided the DNA swab, but was not arrested for the murder until November 21,
35 2006. According to the prosecutor, appellant was not given his *Miranda* rights when
36 he was taken into custody on November 18 on the parole violation. Defense counsel
37 responded that appellant had asked for an attorney, even if he was not read his rights
38 under *Miranda*, and was told he was not entitled to one. The trial court determined
39 there was no error under *Doyle*.

40 The rule in *Doyle* is predicated on the notion that a defendant who is explicitly
41 advised of his right to remain silent under *Miranda*, and then exercises that right, has
42 been given an implied assurance by law enforcement that the silence will carry no
43 penalty. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 628.) "Thus, the Constitution
44 does not prohibit the use for impeachment purposes of a defendant's silence prior to

1 arrest [citation], or after arrest if no *Miranda* warnings are given, [citation].” (*Brecht*,
 2 at p. 628.) The record before us indicates the prosecutor asked appellant about his
 3 silence after he had been taken into custody, but before he had been advised of his
 4 rights under *Miranda*.

5 Appellant argues that apart from *Doyle*, the Fifth Amendment precludes the use of a
 6 defendant’s post-arrest, pre-*Miranda* silence as impeachment evidence when the
 7 defendant has invoked the right to counsel. Appellant acknowledges that his trial
 8 counsel did not object on this ground, but argues the issue has been preserved for
 9 appellate review because it is closely related to the claim of *Doyle* error that was
 10 raised at trial.

11 Even if we assume appellant’s current claim has been preserved, no prejudice resulted
 12 from the prosecutor’s questions about his failure to tell his story when he was taken
 13 into custody. The evidence established that appellant had already spoken to police
 14 and denied knowing anything about the Baldwin murder, a version of events that
 15 directly contradicted his trial testimony that he had stumbled onto the scene after
 16 Baldwin had been killed. If the prosecution had not questioned appellant about his
 17 post-custody silence, the jury would still have been aware he had lied when he
 18 originally spoke to the police investigators.

19 The evidence of appellant’s affirmatively false story was far more incriminating and
 20 damaging to his credibility than his silence when taken into custody. In *People v.*
 21 *Hinton* (2006) 37 Cal.4th 839 at page 868, the court similarly concluded a reference
 22 to the defendant’s post-arrest silence was harmless where the jury already knew the
 23 defendant had given false statements to the police: “The problem with defendant’s
 24 trial testimony was not that the jury heard that he once invoked his *Miranda* rights,
 25 but that he repeatedly provided in the other interviews untrue accounts of his
 26 involvement in the murders.” Any violation of appellant’s rights under the Fifth
 27 Amendment was harmless beyond a reasonable doubt.

28 Exh. 3 at 16-18.

17 Assuming petitioner in fact invoked his right to counsel, that invocation did not equate to an
 18 invocation of the right to remain silent. Those are two separate rights under *Miranda*, and the
 19 “implicit assurance” upon which *Doyle* relies is the “right-to-remain silent component of
 20 *Miranda*.” *Brecht v. Abrahamson*, 507 U.S. at p. 628. “Such silence is probative and does not
 21 rest on any implied assurance by law enforcement authorities that it will carry no penalty.” *Ibid.*
 22 “Thus, the Constitution does not prohibit the use for impeachment purposes of a defendant’s
 23 silence prior to arrest.” *Ibid.*

24 In *Brecht*, the first time the defendant claimed the shooting was an accident was when he
 25 took the stand at trial. *Brecht v. Abrahamson*, 507 U.S. 619. “It was entirely proper and
 26 probative” for the State to impeach his testimony by pointing out that defendant had failed to tell
 27 anyone before the time he received his *Miranda* warnings about the shooting being an accident.

1 *Id.* at 628. As to petitioner's claim that invocation of the right to counsel is a "per se" invocation
 2 of the right to remain silent, the *Brech* court specifically noted that the "implicit assurance" upon
 3 which *Doyle* relies is the "right-to-remain silent component of *Miranda*." *Id.* at 628.

4 *Fare v. Michael C.*, 442 U.S. 707 (1979) is not on point. Petn., Attachment at 17. In *Fare*,
 5 the Supreme Court held that a totality of the circumstances approach should be used to determine
 6 whether a juvenile validly waived his *Miranda* rights. The high court's approach mandated an
 7 inquiry into all the circumstances surrounding the interrogation, including the juvenile's age,
 8 experience, background, and intelligence. *Id.* at 725. Here, petitioner was not a juvenile; he was
 9 not given *Miranda* warnings; and he did not invoke his right to remain silent. Therefore, there
 10 was no "per se invocation of all his Fifth Amendment rights under *Miranda*."

11 Any error in this case was harmless under *Brech*. Any rational jury would credit the
 12 prosecution's strong case, reject the implausible defense, and find petitioner guilty as charged.
 13 The jury was well aware that petitioner changed his story dramatically from a complete denial of
 14 any involvement to admission that he was present at the scene of the murder. His silence upon
 15 arrest was inconsequential.

16 **V. THE TRIAL COURT PROPERLY EXCLUDED IRRELEVANT EVIDENCE OF THE
 17 VICTIM'S STATE OF MIND**

18 Petitioner contends that the trial court erroneously denied his request to present testimony
 19 of the victim's statement regarding her state of mind just prior to her death. Petn., Attachment at
 20 17-22.

21 Federal habeas review does not lie to review a state court's evidentiary ruling, unless it was
 22 so prejudicial as to constitute a violation of due process. *Estelle v. McGuire*, 502 U.S. at 67.
 23 "[W]ell-established rules of evidence permit trial judges to exclude evidence if its probative value
 24 is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or
 25 potential to mislead the jury. Plainly referring to rules of this type, we have stated that the
 26 Constitution permits judges to exclude evidence that is repetitive, only marginally relevant or
 27 poses an undue risk of harassment, prejudice, or confusion of the issues." *Holmes v. South*
 28 *Carolina*, 547 U.S. 319, 326-327 (2006) (citations omitted). A due process violation arises only

1 where the excluded evidence had “persuasive assurances of trustworthiness” and was “critical” to
 2 the defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

3 The California Court of Appeal rejected petitioner’s claim. Specifically, the court held:

4 V. Exclusion of Victim’s Hearsay Statements Concerning Third Party

5 Appellant argues the trial court erred in excluding evidence that shortly before her
 6 murder, Baldwin had told her friend Roberta Edlebrock she was uncomfortable
 7 staying overnight in the shop where she worked because she was unnerved by the
 8 shop’s manager, Ara Derboghosian. According to defense counsel’s offer of proof,
 9 Baldwin had asked to stay with Edelbrock, and had told her Derboghosian was
 10 “creepy” and would come into the area of the shop where she was sleeping at odd
 11 hours. Defense counsel argued that Baldwin’s statements to Edelbrock were
 12 admissible under the state of mind exception to the hearsay rule (Evid. Code, § 1250),
 13 and were relevant to support a third party culpability defense pointing to
 14 Derboghosian as the actual killer. Counsel argued that this theory was consistent
 15 with her crime scene reconstruction expert’s testimony that the scene of the crime
 16 appeared to have been staged to look like someone had broken in.

17 To be admissible, evidence of third party culpability must be “direct or circumstantial
 18 evidence linking the third person to the actual perpetration” of the crimes for which
 19 the defendant is being prosecuted. (*People v. Hall* (1986) 41 Cal.3d 826, 833 (Hall).) Third-party culpability evidence is subject to normal state evidentiary rules, and
 20 cannot be premised on inadmissible hearsay. (*Id.* at pp. 834-835; *People v. Frierson*
 21 (1991) 53 Cal.3d 730, 746 [“ . . . Hall did not undertake to repeal the Evidence Code.
 22 Incompetent hearsay is as inadmissible as it always was’ ”]; *see also People v.*
 23 *Bradford* (1997) 15 Cal.4th 1229, 1324-1325; *People v. Adams* (2004) 115
 24 Cal.App.4th 243, 253 (*Adams*).)

25 Appellant contends Baldwin’s statements to Edelbrock were admissible under
 26 Evidence Code section 1250, which provides, “(a) Subject to Section 1252
 27 [conditioning admissibility on the trustworthiness of a statement], evidence of a
 28 statement of the declarant’s then existing state of mind, emotion, or physical
 29 sensation . . . is not made inadmissible by the hearsay rule when: [¶] (1) The evidence
 30 is offered to prove the declarant’s state of mind, emotion, or physical sensation at that
 31 time or at any other time when it is itself an issue in the action; or [¶] (2) The
 32 evidence is offered to prove or explain acts or conduct of the declarant. [¶] (b) This
 33 section does not make admissible evidence of a statement of memory or belief to
 34 prove the fact remembered or believed.”

35 To the extent Baldwin’s statements to Edelbrock were offered to prove
 36 Derboghosian was the killer, they were hearsay and inadmissible unless authorized
 37 by a hearsay exception. (*People v. Noguera* (1992) 4 Cal.4th 599, 622.) A murder
 38 victim’s hearsay statements describing her fear of the defendant (or, logically, some
 39 identified third party) may be admissible under Evidence Code section 1250 when her
 40 own conduct in conformity with that fear is at issue, or when there is some evidence
 41 the defendant (or a third party) was aware of the victim’s fear and may have been
 42 motivated by it in some way. (*People v. Ricardi* (2012) 54 Cal.4th 758, 816-820
 43 (*Ricardi*) [defendant’s exploitation of victim’s fear relevant to show motive and
 44 premeditation]; *People v. Waidla* (2000) 22 Cal.4th 690, 725 [victim’s fear of
 45 defendant relevant to whether she would have consented to defendant’s entry into her
 46 residence in case where burglary special circumstance alleged].)

1 Baldwin's statements to Edelbrock were not admissible to prove her own state of
 2 mind or conduct because her state of mind and conduct were not issues in the case.
 3 (*People v. Ruiz* (1988) 44 Cal.3d 589, 607-610.) Nor were the statements admissible
 4 to show Derbogossian had a motive to kill Baldwin, when there was no evidence
 5 Derbogossian knew of Baldwin's feelings about him. (*Riccardi, supra*, 54 Cal.4th at
 6 p. 820.) Rather, the statements were statements of memory and belief offered to
 7 prove the fact remembered or believed (that Derbogossian was creepy and had come
 8 into the area where Baldwin was sleeping in the shop), and they were inadmissible
 9 under Evidence Code section 1250, subdivision (b).

10 The trial court did not abuse its discretion in excluding the evidence. (*People v.*
 11 *McKinnon* (2011) 52 Cal.4th 610, 658 [ruling under Evid. Code, § 1250 reviewed for
 12 abuse of discretion]; *People v. Elliott* (2012) 53 Cal.4th 535, 581 [court's ruling on
 13 admissibility of third party culpability evidence reviewed for abuse of discretion].)
 14 The defense theory of third party culpability did not render inadmissible hearsay
 15 admissible. (*Adams, supra*, 115 Cal.App.4th at p. 253.)

16 Exh. 3 at 19-20.

17 In *Holmes v. South Carolina*, 547 U.S. 319, the Supreme Court held that the exclusion of
 18 evidence of third party liability denied due process where the state court's sole rationale for the
 19 ruling was that the prosecution's evidence was strong, and the court did not address the probative
 20 value of the proffered defense evidence. *Id.* at 329. However, the Supreme Court reaffirmed the
 21 states' rights to fashion rules that exclude evidence that is irrelevant, cumulative, or where the
 22 probative value is outweighed by the potential to mislead, cause confusion, or create unfair
 23 prejudice. *Id.* at 326-327. The Supreme Court expressly approved the states' rights to exclude
 24 third party culpability evidence by way of "rules regulating the admission of evidence proffered
 25 by criminal defendants to show that someone else committed the crime with which they are
 26 charged." *Id.* at 327-328 (citing *People v. Hall*, 41 Cal.3d 826, 833 (1986), which states the
 27 California rule that to be admissible third party culpability evidence must be capable of raising a
 28 reasonable doubt, and court need not allow "any evidence, however remote," such as evidence of
 another person's mere motive or opportunity to commit the crime). Thus, the Supreme Court has
observed that "[o]nly rarely have we held that the right to present a complete defense was
violated by the exclusion of defense evidence under a state rule of evidence." *Nevada v. Jackson*,
133 S.Ct. 1990, 1993 (2013) (per curiam).

29 The Ninth Circuit has also affirmed the state courts' application of rules to exclude third
 30 party culpability evidence. *Phillips v. Herndon*, 730 F.3d 773, 776-778 (9th Cir. 2013) (state
 31

1 court reasonably excluded third party confession where witness made three conflicting and
 2 contradictory statements); *Christian v. Frank*, 595 F.3d 1076 (2010) (state court reasonably
 3 excluded evidence of two unreliable confessions by third party); *Spivey v. Rocha*, 194 F.3d 971,
 4 978 (9th Cir. 1999) (in pre-AEDPA case, Ninth Circuit upheld exclusion of gang evidence to
 5 suggest that third party might have killed victim, where proffered evidence “does not identify a
 6 possible suspect or link any third party to the murder, or establish an actual motive rather than a
 7 possible or potential motive”); *Perry v. Rushen*, 713 F.2d 1447, 1451-1455 (9th Cir. 1983).
 8 Because this is a general rule, the state courts have broad leeway to apply it. *Yarborough v.*
 9 *Alvarado*, 541 U.S. 652, 664 (2004).

10 As the California appellate court properly found, Joan Baldwin’s state of mind was not
 11 factually relevant in this case. Evidence of a murder victim’s fear of the alleged killer may be
 12 admissible when the victim’s state of mind is directly relevant to an element of the offense. Or,
 13 that fear may be in issue when, according to the defendant, the victim has behaved in a manner
 14 inconsistent with that fear. For example, Joan Baldwin’s state of mind would have been relevant
 15 if petitioner claimed that he acted in a certain way because of what she did. However, according
 16 to the defense, Baldwin was dead before petitioner arrived on the scene. Therefore, her state of
 17 mind was not in issue and was irrelevant.

18 Petitioner’s theory of third party culpability did not make Baldwin’s state of mind relevant.
 19 Also, the fact that Baldwin did not like Ara Derboghosian did not create a causal link between
 20 Derboghosian and the crime. Even if the evidence established that Derboghosian was “creepy”
 21 and had a key, that did not establish direct or circumstantial evidence linking Derboghosian to
 22 the actual perpetration of the crime in a case where petitioner left his bloody fingerprint on the
 23 victim’s body and his DNA at the crime scene and admitted he was present on the night of the
 24 murder and stole a car. Derboghosian did not leave DNA at the scene, a bloody fingerprint on
 25 the body, or steal a car while Baldwin lay dead on the floor. Since the proffered evidence was not
 26 relevant, and since the defense theory did not suffice to raise a reasonable doubt as to petitioner’s
 27 guilt, evidence concerning Baldwin’s state of mind was not admissible to show third party
 28 culpability. Finally, even if the jury had heard that Baldwin considered Derboghosian a creepy

1 guy with a key, that testimony would not have placed Derbogossian at the scene or negated
2 evidence that appellant was in the auto shop that night, left his bloody fingerprint on the victim,
3 stole a car from the scene, left Baldwin's blood inside it, and lied to the police at every
4 opportunity. Thus, any error was harmless under *Brech*.

5 Since the state court's determination was neither contrary to, nor an unreasonable
6 application of established Supreme Court precedent, petitioner's claim fails.

7 **CONCLUSION**

8 The petition for writ of habeas corpus should be denied.

9 Dated: June 8, 2015

Respectfully Submitted,

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